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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 104.

HENRY A. M. SMITH, AS RECEIVER OF THE LATE CORPORATION NAMED AND STYLED "THE PRESIDENT, DIRECTORS, AND COMPANY OF THE STATE BANK," &C., PLAINTIFF IN ERROR,

vs.

R. H. JENNINGS, AS TREASURER OF THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This case is in this court on a writ of error to the Supreme Court of South Carolina.

The essential facts are as follows:

March 19, 1903, the plaintiff in error, as receiver of the "President, Directors, and Company of the State Bank," filed his petition in the Supreme Court of South Carolina,

asking the court to enjoin the defendant in error, the Treasurer of the State, from writing $37,000 of certain "State bonds off the books in his office and no longer carrying said bonds on the books as a debt of the State."

The State Bank was originally chartered by the General Assembly of South Carolina in 1802. Its charter was renewed from time to time and finally expired in 1874 (Rec., 2).

In 1854 the General Assembly authorized the issuance, in aid of the Blue Ridge Railroad and for the purpose of purchasing shares of its capital stock, of State bonds to the amount of $1,000,000, payable in five installments of $200,000 each, the first installment payable after the expiration of twenty years and the remaining $800,000 in four equal annual installments thereafter (Rec., 2, 3).

The State Bank became the owner of 100 of these bonds (numbered from 801 to 900, each of the denomination of $1,000), and all of them, with other assets of the bank, were taken from its agents by soldiers in General Sherman's army when it passed through South Carolina in 1865. Nineteen of these bonds were recovered by the bank before a receiver for it was appointed (Rec., 5).

Under an act of the General Assembly of 1869, providing for the placing in liquidation of banks which had issued bills of credit and had failed to pay them, a receiver was appointed early in 1870 for the State Bank, to take charge of its property and assets and finally settle its affairs (Rec., 3, 4, 5).

April 20, 1870, the court passed an order in the cause enjoining the State treasurer from paying either the principal or interest on any of the eighty-one bonds remaining outstanding to any person except to the receiver (Rec., 5). The order, while it enjoined the payment of the bonds, did not enjoin the funding of them under the conversion act of 1869 or the consolidation of them under the consolidation act of 1873, and in 1876 it was discovered that several of the bonds had been funded, and were thus lost to the receiver.

The court passed a second order February 4, 1876, enjoining the treasurer from funding or consolidating any of the bonds remaining outstanding (Rec., 5). A number of the bonds were recovered from time to time and funded by the receiver under orders from the court (Rec., 6).

An order was passed June 29, 1894, referring the case to one of the masters of the court to report which of the bonds in question were still outstanding, unpaid and unfunded. The master reported that thirty-eight of the bonds were still outstanding and unpaid, and that "the said bonds are the property of the late corporation known as the President, Directors, and Company, of the State Bank, and that the receiver of said corporation is the only person entitled to fund and collect the same from the treasurer of the State." This report was confirmed by the court (Rec., 6).

The thirty-eight bonds outstanding matured on the 1st day of July, 1879 (Rec., 7).

By an act of the General Assembly of South Carolina approved February 25, 1896, it was provided that—

> "After the approval of this act, no coupon bond of this State payable to bearer nor any coupon thereof shall be consolidated, converted, funded or paid by the State Treasurer after the expiration of twenty years from the date of maturity of such bonds" (Rec., 7).

After the 1st day of July, 1899, the outstanding bonds were carried on the books of the State Treasurer as "Old bonds not fundable (act of 1896), Blue Ridge Railroad bonds, $37,000" (Rec., 10).

February 22, 1902, the General Assembly passed a joint resolution providing as follows:

> "That whereas, by an act of the legislature of 1896, the treasurer of this State is forbidden to pay, consolidate or fund any coupon bond of the State after the expiration of twenty years from the date of maturity of such bonds, and certain bonds entered on the

books of the State treasurer as 'Old bonds not fundable (act of 1896), Blue Ridge Railroad bonds, $37,000,' are still carried on the books of the State treasurer; therefore be it

"*Resolved,* That the State treasurer be, and he is hereby, authorized and required to write said bonds off of the books in his office, and no longer carry said bonds on the books as a debt of the State" (Rec., 11).

The General Assembly adjourned on the same day this resolution was passed. A new General Assembly convened January 13, 1903, and on the next day the resolution was transmitted to the Senate by the Governor unsigned and unapproved (Rec., 11).

The total membership of the Senate of South Carolina is 41, and that of the House of Representatives 124 (Rec., 12, 13).

February 19, 1903, the Senate passed the resolution over the Governor's veto by a vote of 25 to 11. A motion to reconsider this vote was adopted, and on February 20, 1903, upon reconsideration, the resolution was passed by a vote of 28 to 13. It was thereupon sent to the House, which, on the same day, passed it over the Governor's veto by a vote of 60 to 25 (Rec., 13).

The petition alleges that the joint resolution is null and void because—

(1) It impairs the obligation of a contract, in violation of the State and Federal constitutions.

(2) It did not contain the enacting clause, "Be it enacted by the General Assembly of South Carolina," as required by the Constitution of South Carolina.

(3) It was not passed over the Governor's veto by two-thirds of all the members of each house of the General Assembly.

(4) It was not returned to and reconsidered by the same General Assembly which originally passed it, but by a new General Assembly (Rec., 13).

The petitioner prayed that an "injunction be issued, perpetually enjoining and restraining the State treasurer, the respondent herein, from writing the said $37,000 of State bonds off of the books in his office and no longer carrying said bonds on the books as a debt of the State," and for general relief (Rec., 13, 14).

A temporary restraining order was passed in accordance with the prayer of the petition, and a rule to show cause issued against the State treasurer, who made return to it April 21, 1903, by demurring to the petition.

The case was heard by the Supreme Court of South Carolina May 4, 1903, and on September 10, 1903, the court handed down its decision refusing the injunction prayed for, dissolving the temporary restraining order, and dismissing the petition (Rec., 17-25).

A writ of error from this court was allowed by the Chief Justice of the Supreme Court of South Carolina August 14, 1905 (Rec., 29, 30).

ARGUMENT.

The appellant in his assignments of error alleges that the Supreme Court of South Carolina erred in three particulars, viz:

(1) In deciding that the "joint resolution to authorize and require the State treasurer to write off of the books in his office certain bonds entered on said books as 'Old bonds not fundable (act of 1896), Blue Ridge Railroad bonds, $37,000,' " was constitutionally and legally passed by the General Assembly of South Carolina over the Governor's veto thereof.

(2) In deciding that said joint resolution became a law notwithstanding the use of the word "resolved" instead of the word "enacted."

(3) In deciding that said joint resolution does not impair the obligation of any contract.

The only Federal question suggested in the record is involved in the third assignment of error. The first and second assignments raise the question whether or not the joint resolution was passed by the General Assembly in accordance with the requirements of the Constitution of South Carolina, and this is not a Federal question.

The questions involved in the first and second assignments will be considered together, and then the question raised by the third assignment will be considered separately.

I.

WHETHER OR NOT A STATE STATUTE IS PASSED IN ACCORDANCE WITH THE REQUIREMENTS OF A STATE CONSTITUTION IS NOT A FEDERAL QUESTION.

The Constitution of South Carolina provides that when an act of the General Assembly is vetoed by the Governor it shall be returned with his objections to the house in which it originated, to be reconsidered, and "if, after such reconsideration, two-thirds of that house shall agree to pass it, it shall be sent, together with the objections, to the other house, by which it shall be reconsidered, and if approved by two-thirds of that house, it shall have the same effect as if it had been signed by the Governor."

The Constitution also provides that "a majority of each house shall constitute a quorum to do business." It further provides that "the style of all laws shall be: Be it enacted by the General Assembly of the State of South Carolina."

The joint resolution in question was passed on the 22d day of February, 1902, and the General Assembly adjourned on the same day. The style of the resolution is, "Be it resolved by the General Assembly of the State of South Carolina." A new General Assembly convened January 13, 1903,

and on the next day the resolution was transmitted to the Senate by the Governor unsigned and unapproved (Rec. 11).

The total membership of the Senate of South Carolina is 41, and that of the House of Representatives 124 (Rec., 12, 13).

February 19, 1903, the Senate passed the resolution over the Governor's veto by a vote of 25 to 11. A motion to reconsider this vote was adopted, and on February 20, 1903, upon reconsideration, the resolution was passed by a vote of 28 to 13. It was thereupon sent to the House, which, on the same day, passed it over the Governor's veto by a vote of 60 to 25 (Rec., 13).

By his first and second assignments of error the appellant raises the question whether or not the joint resolution was passed by the General Assembly in accordance with the requirements of the State Constitution, the substance of his contentions being (1) that the resolution could not be passed over the Governor's veto except by a vote of two-thirds of the whole membership of each house, and not simply by two-thirds of a quorum of each house; (2) that the resolution must be returned to and reconsidered by the same General Assembly which passed it, and not by a new General Assembly; (3) that the joint resolution is invalid because it did not contain the style "Be it enacted," etc., but contained the words "Be it resolved," etc. These questions were all raised in the court below and decided adversely to the contentions of the petitioner. They involve simply the question whether or not the joint resolution was passed by the General Assembly in accordance with the requirements of the Constitution of South Carolina. The Supreme Court of South Carolina decided that it was, and its decision is binding on this court.

That the decision of the highest court of a State that a statute is not in conflict with the Constitution of the State

is conclusive on the Federal courts is so well settled as to be no longer open to discussion.

Jackson *v.* Lamphire, 3 Pet., 278.
South Ottawa *v.* Perkins, 94 U. S., 260.
Atlantic and Gulf R. R. Co. *v.* Georgia, 98 U. S., 359.
Adams Express Co. *v.* Ohio State Auditor, 165 U. S., 194.
Bank *v.* Pennsylvania, 167 U. S., 461.
Brown *v.* New Jersey, 175 U. S., 171.
Carstairs *v.* Cochran, 193 U. S., 11.
Hodge *v.* Muscatine County, 196 U. S., 275.
Armour Packing Co. *v.* Lacy, 200 U. S., 225.

II.

The Joint Resolution Did Not Impair the Obligation of Any Contract.

The bonds in question were issued by the State in 1859 and matured on the 1st day of July, 1879 (Rec., 7). On February 25, 1896, the General Assembly of South Carolina passed a law providing that—

> "After the approval of this act, no coupon bond of this State payable to bearer, nor any coupon thereof, shall be consolidated, converted, funded, or paid by the State treasurer after the expiration of twenty years from the date of the maturity of such bonds" (Rec., 7).

Ample time was afforded after the passage of this act within which to have the bonds involved in this suit consolidated, converted, funded or paid. The statute did not bar them until July 1, 1899—three years and four months after the act took effect.

This suit was filed March 19, 1903 (Rec., 14). It will be seen, therefore, that at that time all remedy on these bonds was barred by the statute, and had been barred for

more than three years. The validity of the act of February 25, 1896, was not raised in the court below, but even if it had been, the act is clearly valid. This court has repeatedly held that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect.

Terry *v.* Anderson, 95 U. S., 628.
Turner *v.* New York, 168 U. S., 90.
Wilson *v.* Iseminger, 185 U. S., 56.

In Terry *v.* Anderson, Mr. Chief Justice Waite, speaking for the court, said:

> "This court has often decided that statutes of limitations affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect; and it is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of actions, or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. * * * In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government unless a palpable error has been committed. * * * Here nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more."

In Turner *v.* New York a statute of New York fixing a limitation of six months after the passage of the act within which actions for lands theretofore sold for taxes might be brought was declared not repugnant to the Constitution of the United States.

In the case at bar three years and four months were given to sue upon a cause of action which had been running sixteen years and eight months at the time the act was passed.

In view of the fact that all remedy on the bonds involved in this suit had been barred for more than three years at the time the suit was filed, and has now been barred for more than seven years, it would seem that the question whether or not the joint resolution of February 22, 1902, is unconstitutional is a moot question; for, even if it be declared unconstitutional, the appellant has no remedy on the bonds. This court does not sit to determine moot questions, especially questions of constitutional law.

Mills *v.* Green, 159 U. S., 651.
Tennessee *v.* Condon, 189 U. S., 64.
Jones *v.* Montague, 194 U. S., 47.
Security Mutual Life Ins. Co. *v.* Prewitt, 200 U. S., 446.

Aside, however, from the act of February 25, 1896, it is clear that the joint resolution of February 22, 1902, did not impair the obligation of any contract between the State of South Carolina and the holder of the bonds in question; for, as was said by the Supreme Court of South Carolina, whatever duty devolves upon the State to pay or fund these bonds, and whatever rights the petitioner has in regard to them, such duty and right cannot be affected by the manner in which the State treasurer is directed to keep his books.

> "The obligation of a contract is that duty of performing a contract according to its terms and intent which the law recognizes and enforces" (Black on Constitutional Law, page 524).

The obligation of a contract is not impaired unless by subsequent legislation the terms, provisions, and conditions embraced in the contract itself are varied, or the remedies afforded by law for its enforcement at the time the contract is made are wholly taken away or materially altered.

This court said in the case of McCracken *v.* Hayward, 2 How., 612:

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act on the remedy, is directly obnoxious to the provisions of the Constitution."

Subsequent legislation, in order to fall within the constitutional prohibition, must affect the right conferred by the contract or the remedies afforded by law for its enforcement when the contract is made.

The joint resolution complained of in this case does neither. It is a mere direction by the legislature to the State treasurer as to a question of book-keeping and nothing more. It authorizes and requires him "to write said bonds

off of the books in his office, and no longer carry said bonds on the books as a debt of the State."

It is not pretended, and will not be pretended, that the right to have the bonds carried on the books of the State treasurer, as a debt of the State or otherwise, was included among the terms and provisions of the contract between the State and the bondholders; nor is it pretended, nor will it be pretended, that the laws in existence at the time the bonds were issued required them to be so carried on the books of the State. It does not appear that the State Treasurer was required to carry them on his books by any law whatever. It appears from the resolution itself that they were carried under the entry "Old bonds not fundable (act of 1896), Blue Ridge Railroad bonds, $37,000." The entry in this form could not have appeared on the treasurer's books until after the passage of the act of February 25, 1896—nearly thirty-seven years after the bonds were issued.

Nothing that the State treasurer may or may not do with reference to his books, whether on his own initiative or under instructions from the legislature, can affect the validity of the bonds nor the rights of holders of them. Whatever duty devolves on the State to pay or fund these bonds, or whatever right holders have in regard to them, such duty and such right cannot be affected by the manner in which the State treasurer is directed to keep his books.

The most that can possibly be said against the joint resolution is that it is a denial of the liability of the State to pay the bonds, because it directs the treasurer to no longer carry them on his books *as a debt of the State*. But if, instead of being a direction by the legislature to the treasurer as to book-keeping, the resolution had contained an express and unequivocal denial by the State of its obligation to pay the bonds, it would not impair the rights of any holders of the bonds. This point was adjudicated by this court in the case of St. Paul Gas Light Co. *v.* St. Paul, 181 U. S., 143.

In that case Mr. Justice White, delivering the opinion of the court, said:

> "The other provisions in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

But this resolution merely directs the Treasurer not to carry the bonds *on his books* as a debt of the State—it contains no denial of the obligation of the State to pay them. It is merely a direction by the legislature to the treasurer as to how he shall keep his books—nothing more; and it does not impair the obligation of any contract ex-

isting between the State and any holder of the bonds in question.

It is respectfully submitted, therefore, that there was no error in the decision of the Supreme Court of South Carolina, and that it should be affirmed.

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